**BEFORE THE APPEALS BOARD**
**FOR THE**
**KANSAS DIVISION OF WORKERS COMPENSATION**

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| **MARY ELLEN GOJCEVIC** | ) | |
| Claimant | ) | |
| | ) | |
| VS. | ) | Docket No. 1,044,385 |
| | ) | |
| **USD 229** | ) | |
| Self-Insured Respondent | ) | |

# ORDER

## STATEMENT OF THE CASE

Respondent requested review of the May 19, 2009, preliminary hearing Order entered by Administrative Law Judge Steven J. Howard. James E. Martin, of Overland Park, Kansas, appeared for the claimant. Christopher J. McCurdy, of Overland Park, Kansas, appeared for the self-insured respondent.

The Administrative Law Judge (ALJ) authorized Dr. Horton to be claimant's treating physician.

The record on appeal consists of the transcript of the May 19, 2009, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

## ISSUES

Respondent argues that the ALJ exceeded his jurisdiction in awarding benefits, contending that claimant did not meet her burden of proving she sustained a compensable injury. Respondent argues that claimant's activity of walking was a normal activity of day-to-day living and was a risk personal to her. Respondent argues that there was no evidence that respondent's floor was wet causing claimant's fall and that because claimant was equally exposed to risk by injury while walking whether at home or at work, her injuries are not compensable.

Claimant argues that she was in the course of her employment when she met with personal injury by an accident that arose out of the requirements of her employment. She contends that her accident falls within the category of a neutral risk for which respondent bears the risk of her injury.

The issue for the Board's review is: Did claimant suffer personal injury by accident that arose out of and in the course of her employment, or was her fall an activity of normal day-to-day living and a risk that was personal to her?

## FINDINGS OF FACT

Claimant testified that on February 2, 2009, she was taking her class to the library when she slipped and fell, and her left ankle buckled out. She notified the school nurse of her accident. Claimant said that the nurse's secretary was going to take her to respondent's workers compensation clinic, but the school nurse called and said her injuries would not be covered under workers compensation. Claimant was then taken to Overland Park Regional Medical Center emergency room. She was given ice to put on her ankle, and the ankle was x-rayed to be sure it was not broken. She was given a brace wrap to keep her ankle steady until she could be seen by Dr. John Romito.

Claimant testified that she believes she slipped on some water on the floor. However, she was not certain there was water on the floor, and she did not notice that her clothes or any part of her body was wet. She admitted that she did not know what caused her fall. She saw Dr. Romito on February 6, 2009, four days after her fall, and told him her ankle came over. She said that she rolled her ankle. Dr. Romito has diagnosed her with an ankle sprain and degenerative arthritis of the ankle.

Sidney Cumberland, respondent's risk manager, testified that on the day of claimant's accident, he was speaking on the telephone with the school nurse. He asked the nurse how the accident happened, and he heard claimant say that her leg gave out and she fell. Mr. Cumberland spoke directly with claimant the next day. During that conversation, claimant told him that her leg had given out. She asked him why workers compensation would not cover her accident. He told her that she would not be covered because under the workers compensation statute, activities of daily life are not covered.

Mr. Cumberland testified that during his conversation with claimant on February 3, she did not say that she had slipped and fallen in water. He testified that he specifically asked her if there was something on the floor that caused her to fall, and her response was no. Claimant, however, testified that when Mr. Cumberland asked her if something had been on the floor, she told him she thought there was water on the floor when she slipped.

## PRINCIPLES OF LAW

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[1]

[1] K.S.A. 2008 Supp. 44-501(a).

Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[2]

Because the accident occurred while claimant was at work, the accident occurred in the course of claimant's employment. However, the accident must also arise out of the employment before it is compensable under the Kansas Workers Compensation Act.[3]

The phrase "out of" employment points to the cause or origin of the worker's accident and requires some causal connection between the accident and the employment. An accidental injury arises out of employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is performed and the resulting injury. An injury arises out of employment if it arises out of the nature, conditions, obligations, and incidents of the employment.[4]

In *Hensley*[5], the Kansas Supreme Court adopted a risk analysis. It categorized risks into three categories: (1) those distinctly associated with the job; (2) risks which are personal to the workman; and (3) neutral risks which have no particular employment or personal character. According to 1 Larson's *Workmen's Compensation Law*, Sec. 7.04 (2006), the majority of jurisdictions compensate workers who are injured in unexplained falls upon the basis that an unexplained fall is a neutral risk and would not have otherwise occurred at work if claimant had not been working. Although in this case claimant did not have an unexplained fall, his accident could be described as falling into the same category of a neutral risk.

K.S.A. 2008 Supp. 44-508(d) defines "accident" in part:

> "Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment.

K.S.A. 2008 Supp. 44-508(e) defines "personal injury" and "injury":

> "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under

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[2] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

[3] See *Newman v. Bennett*, 212 Kan. 562, 512 P.2d 497 (1973).

[4] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272 at Syl. ¶ 4.

[5] *Hensley v. Carl Graham Glass*, 226 Kan. 256, 258, 597 P.2d 641 (1979).

> the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence. An injury shall not be deemed to have been directly caused by the employment where it is shown that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living.

The Kansas Supreme Court, in *Boeckmann,*[6] denied workers compensation benefits, holding that

> physical disability resulting from a degenerative arthritic condition of the hips which progressed over a period of years while the workman was employed is not compensable as an accident arising out of and in the course of his employment under the circumstances found to exist in the instant case.

Among the circumstances the court found to exist was that Mr. Boeckmann's disabling arthritis existed before his employment with Goodyear and that "the degenerative process will continue to progress long after his retirement."[7] The evidence was

> that Mr. Boeckmann's hip problems, or the disabilities arising therefrom, were caused by his work at the Goodyear plant; that his employment did not cause his condition to occur; that the hip condition had been a progressive process; that increased activity was liable to aggravate the claimant's underlying problem but that almost any everyday activity has a tendency to aggravate the problem; that every time the claimant bent over to tie his shoes, or walked to the grocery store, or got up to adjust his TV set there would be a kind of aggravation of his condition. . . .
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> . . . The examiner found, on what we deem sufficient evidence, that any movement would aggravate Boeckmann's painful condition and there was no difference between stoops and bends on the job or off.[8]

Similarly, in *Martin,*[9] the Kansas Court of Appeals held that "[i]njuries resulting from risk personal to an employee do not arise out of his employment and are not compensable."

More recently, the Kansas Court of Appeals in *Johnson*[10] held:

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[6] *Boeckmann v. Goodyear Tire & Rubber Co.*, 210 Kan. 733, Syl., 504 P.2d 625 (1972).

[7] *Id.* at 736.

[8] *Id.* at 738-39.

[9] *Martin v. U.S.D. No. 233*, 5 Kan. App. 2d 298, Syl. ¶ 3, 615 P.2d 168 (1980).

[10] *Johnson v. Johnson County*, 36 Kan. App. 2d 786, Syl. ¶ 3,147 P.3d 1091, *rev. denied* 281 Kan. 1378 (2006).

> In an appeal from the final order of the Workers Compensation Board awarding compensation for an injury suffered by an employee at the workplace, under the facts of this case substantial evidence did not support the board's finding that the employee's act of standing up from a chair to reach for something was not a normal activity of day-to-day living.

The court found it significant that "Johnson had a history of three or four [prior] incidents of left knee pain. Her treating physician, Dr. Jennifer Finley, testified that '[i]t looks like she had had years of degeneration and had some previous problems, and it was just a matter of time.'"[11]

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[12] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[13]

## ANALYSIS

Claimant either slipped in water and fell or simply rolled her ankle and fell. Claimant testified that she was taking her class to the school library when she slipped on wet tile, causing her left ankle to buckle and her to fall. Respondent's witness, Mr. Cumberland, denies that claimant said the floor was wet. But rather she said that she did not know for certain why her ankle rolled or why she fell. Claimant does not have a history of falling or of a preexisting condition that caused her to fall. The ALJ did not explain his ruling or say which version of events he found most credible. In the absence of any probable explanation for claimant's fall, it would be the result of an unexplained fall and a neutral risk, which is compensable.

Respondent argues that claimant's injury was not caused by her employment because walking is an activity of day-to-day living. However, K.S.A. 2008 Supp. 44-508(e) does not exclude "accidents" that are the result of such activity, but rather it excludes compensation for injuries where the "disability" is as a result of the natural aging process or by the normal activities of day-to-day living. In this case, claimant was on her employer's premises and engaged in the work she was hired to perform. Her injury arose out of the nature, conditions, obligations and incidents of her employment. There was a specific accident which resulted in an injury and disability. There is no persuasive expert

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[11] *Id.* at 788.

[12] K.S.A. 44-534a; see *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[13] K.S.A. 2008 Supp. 44-555c(k).

testimony or medical evidence that claimant's disability resulted from the effects of the ordinary wear and tear common to acts of daily living, as in *Boeckmann*. And this is not a case where claimant had a preexisting condition which was worsened or made symptomatic by a solely personal risk, as in *Martin*. Based upon the record presented to date, claimant suffered an unexplained fall that was a neutral risk and is compensable.

## CONCLUSION

Claimant suffered personal injury by an accident that arose out of and in the course of her employment with respondent. Her resulting disability was not the result of the natural aging process or from the normal activities of day-to-day living.

## ORDER

**WHEREFORE**, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Steven J. Howard dated May 19, 2009, is affirmed.

**IT IS SO ORDERED.**

Dated this _____ day of August, 2009.

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HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: James E. Martin, Attorney for Claimant
Christopher J. McCurdy, Attorney for Self-Insured Respondent
Steven J. Howard, Administrative Law Judge